Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

T. ROBERT HUGHES; ARCO PROPERTIES, LTD.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Is the fact that the defendant is an attorney sufficient without more, to allow a court to lower the Sixth Amendment's threshold of finding waiver of his right to counsel at trial?

II.

Did the trial court fail to insure that a defendant-attorney's Sixth Amendment guarantees of the right to be represented by counsel at his trial were adequately protected, where the court made no inquiry into the matter on the record?

III.

Did the Tenth Circuit Court of Appeals use an improper standard in finding waiver by conduct of a defendant-attorney's right to be represented by counsel at his trial by applying a forfeiture standard in derogation of Sixth Amendment guarantees?

IV.

Does the Government have a duty to rebut or impeach evidence of withdrawal from a conspiracy, once a defendant makes a prima facie showing.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, ARCO Properties, Ltd, has no parent corporation and no publicly held company owns 10% or more of its stock.

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T. ROBERT HUGHES and ARCO PROPERTIES, LTD., (hereinafter "Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals affirming his conviction.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is officially reported at 191 F.3d 1317 (1999), and appears in Appendix A of this petition. The rulings of the Federal District Court for the Northern District of Oklahoma were not reported and appear in Appendix B.

STATEMENT OF JURISDICTION

The petition seeks review of the final judgment of the Tenth Circuit Court of Appeals entered September 14, 1999 as to which a motion for rehearing was denied on November 15, 1999 (Appendix C). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The texts of the Fifth and Sixth Amendments to the United States Constitution (the "Constitution") are reprinted in full at Appendix D, pursuant to Supreme Court Rule 14.1(f).

SUMMARY OF THE ARGUMENT

1. For over sixty (60) years, this Court has consistently held that the fact that a defendant is an attorney is immaterial to a consideration of his right to the assistance of counsel under the protection of the Sixth Amendment and, though

his professional experience might be a factor in determining whether he actually waived his right to the assistance of counsel, it was by no means conclusive. *See, e.g., Glasser v. United States*, 315 U.S. 60 (1942). Although recognizing that this constitutional right could be waived, the Court said that any waiver must be made knowingly and intelligently. *Id.* at 70-71. This Court imposed a solemn duty on the trial court to protect the rights of an accused to have assistance of counsel, even though the accused is himself an attorney. This protecting duty imposes a serious and weighty responsibility upon the trial judge to determine whether there is an intelligent, competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record. *Johnson v. Zerbst*, 304 U.S. 458 (1938). Notwithstanding these well-established principles, the United States District Court for the Northern District of Oklahoma held that Petitioner waived his right to counsel at trial by acting as his own attorneys after the Court discharged Petitioner's previous attorney upon their own motion, notwithstanding the fact that Hughes advised the Court at all times that he was seeking counsel to assist him. The Court proceeded to trial without inquiring of Petitioner, on the record, whether or not he wanted counsel to represent him or whether he was waiving that right and requesting to represent himself at trial.

There are special and important reasons warranting this Court's exercise of its discretion to issue a writ of certiorari to review the District Court's decision in this regard. That decision is in direct conflict with well established precedents of this Court interpreting the Sixth Amendment. Certiorari is also warranted to review the judgment below in this regard

because the Court's failure to jealously guard Petitioner's rights to counsel impaired Petitioner's presentation of his sole defense of withdrawal from the conspiracy charged, and contributed to his conviction and sentence.

This Court has made clear that in a case involving an alleged waiver of a defendants Sixth Amendment right to counsel that a court should indulge every reasonable presumption against waiver of fundamental constitutional rights. *Id.* at 464. For that reason it is the Government that has the burden of establishing a valid waiver. *Brewer v. Williams*, 430 U.S. 404 (1977).

> Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad rather than a narrow interpretation to a Defendant's request for counsel — we presume that the Defendant requests the lawyer's services at every critical stage of the prosecution.

Michigan v. Jackson, 475 U.S. 625, 633 (1986). The Tenth Circuit Court of Appeals nevertheless concluded that Petitioner forfeited his right to counsel by his conduct solely because of Petitioner's professional status where Petitioner requested that he represent himself on pretrial motions and hearings while trying to retain other counsel after the trial court discharged his previous counsel approximately thirty days prior to trial.

2. There are special and important reasons warranting this Court's exercise of its discretion to issue a writ of certiorari to review the Tenth Circuit Court of Appeals decision in this regard. The Tenth Circuit Court of Appeals

decision is in direct conflict with and would engraft exceptions to precedents of this Court interpreting the Sixth Amendment. Sup. Ct. R. 10(b). Review by certiorari is also warranted because the United States Circuit Court of Appeals for the Tenth Circuit fashioned a rule that an attorney's dilatory conduct established a clear waiver (forfeiture) of his right to counsel at trial without a warning or colloquy between Petitioner and the Court. Finally, as above, certiorari is warranted to review the judgment below in this regard because Petitioner was forced by the Court to represent himself at trial, resulting in an impairment of his sole defense of withdrawal from the conspiracy charged, reviewed on appeal for plain error only, substantially contributing to Petitioner's conviction and sentence.

3. This Court has made clear that due process rights under the Fifth Amendment require the government prove all elements of a crime beyond a reasonable doubt and prohibit the shifting of the burden of proof to a defendant on the issue of withdrawal from a conspiracy, once he has made a prima facie showing of said element. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). There are special and important reasons warranting this Court's exercise of its discretion to issue a writ of certiorari to review the Tenth Circuit Court of Appeals decision in this regard as well. The Tenth Circuit Court of Appeals decision is in direct conflict with established precedents of this court interpreting the Fifth Amendment. S. Ct. R. 10(b). Review by certiorari is also warranted because the United States Circuit Court of Appeals for the Tenth Circuit held that the trial court's action was proper in instructing the jury that Petitioner had the sole burden of proof to establish withdrawal from the conspiracy charged in violation of this Court's rule in *Sandrom v. Montana*, 442 U.S. 501 (1979). Finally certiorari is warranted to review

the judgment below in this regard because the opinion of the Tenth Circuit Court of Appeals on this issue is in direct conflict with the opinions of other Circuit Courts of Appeals.

STATEMENT OF THE CASE

Petitioner, T. Robert Hughes, an attorney and ARCO Properties, Ltd., a trust of which Hughes, was sole trustee, convicted of conspiracy to defraud the United States in violation of 18 U.S.C. § 371. The evidence at trial, viewed in the light most favorable to the Government revealed the following: On February 8, 1988, the Corps of Engineers awarded a contract in the amount of $1,828,106 to Frank Minelli, doing business as Swiss Craft Professional Painters, to sandblast and repaint the Robert S. Kerr and the W.D. Mayo locks and dams on the Arkansas River. As a condition to entering into a contract with the government, it was necessary for Minelli to provide the Corps of Engineers with a performance bond. The performance bond was furnished by defendants Thomas Rhoades and Stephen Schluneger, as sureties under the government contract, in the event of Minelli's default. The penal amount under the bond was $731,242.40, with a performance limitation in the amount of the contract price of $1,828,106. In the indictment, the Minelli contract was referred to as the Government Contract. Minelli defaulted by failing to comply with the schedule and specifications of the Government Contract. The Corps of Engineers demanded that defendants Rhoades and Schluneger, satisfy their obligation as sureties. Under the performance bond and federal regulations, Rhoades and Schluneger were given the options to immediately complete the work with a contractor of their choice that was acceptable to the government, or to complete the work with their own forces, or to make payment to the government for the liability

under the bond. If Rhoades and Schluneger chose to satisfy the penal amount under the bond of $731,242.40, it would have required a cash layout by them. By electing to complete the performance, they were not obligated to any cash layout.

On August 14, 1989, Rhoades and Schluneger advised the government that they elected to take over the work and finish it by hiring a subcontractor. To perform under the bond, the Corps of Engineers required Rhoades and Schluneger to execute a Takeover Agreement. The Takeover Agreement restricted Rhoades and Schluneger from receiving any compensation for the work performed except for "actual costs and expenses incurred in completion of the work." In no event would Rhoades and Schluneger be compensated for "any amount in excess of total expenditures necessarily made in completing the work and discharging" their liability under the performance bond. Rhoades and Schluneger solicited a bid from Skyline Painting and accepted Skyline's bid in the amount of $1,200,000 to complete the work required under the Government Contract. Without government's knowledge, Rhoades and Schluneger required Skyline to sign a letter agreement, prepared by defendant Hughes, which misrepresented that Skyline would complete the Government Contract for $1,690,000, instead of the agreed contract bid of $1,200,000. The differential, through various formulas, was to be paid to Rhoades, Schluneger, and Hughes as so-called "finders fees and engineering consulting fees." Rhoades, Schluneger, and Hughes did not disclose to Skyline that these purported "fees" were not authorized under their Takeover Agreement with the Corps of Engineers nor did they disclose that no such engineering consulting services were being rendered by them or the two ARCO Trusts.

Skyline prepared the progress reports for the Corps of Engineers. As required under its agreement with Rhoades and Schluneger, the payments were inflated to include the finders fees and engineering consulting fees. The progress reports were reviewed and approved by Rhoades and sent to the Corps of Engineers.

The progress payments were made by U.S. Treasury checks jointly payable to Rhoades and Schluneger and mailed to Rhoades. Rhoades obtained the endorsement of Schluneger, made disbursements to Skyline and then Skyline made disbursements to Hughes. Hughes channeled the funds through the ARCO Trusts which paid the unauthorized kickbacks to Rhoades, Schluneger and Rhoades' spouse.

Unknown to the government, Rhoades, Schluneger and Hughes were receiving payments for so-called finders fees and engineering consulting services but they were performing no such services, either directly or indirectly. Receipt of these funds by Rhoades, Schluneger and Hughes were fraudulent because they were received by them without the expenditure of any "costs or expenses".

Petitioners Request for Counsel

In the absence of a colloquy on the record in this cause, as required by this Court in *Faretta v. California*, 422 U.S. 806 (1975), the government summarized the waiver of counsel issue in the light most favorable to itself in its brief before the Tenth Circuit as follows:

> During a pretrial conference and motion hearing on November 14, 1997, trial was reset to commence on February 23, 1998, at 9:30 a.m.,

by agreement of all parties. [Aplt's. App. At 1248, minute order dated 11/14/97]. On January 23, 1998, retained counsel, Stanley Monroe, Esq. and Frank Lockhart, Esq. moved to withdraw as counsel of record for Hughes and the ARCO Trusts. Messrs. Monroe and Lockhart informed the Court that:

> 2. The client (Hughes) who is an attorney himself, and his attorneys have reached an impasse over their respective roles in this litigation, to the point where the attorney reasonably believe they cannot provide effective assistance;
>
> 3. Attorneys for Defendant have reached an ethical conflict between their duty to follow the client's wish and yet retain the required independent professional judgment mandated by Rule 2.1 Rules of Professional Conduct.
>
> 4. The client has not abided by the terms of the agreement related to the representation, and has been given reasonable warning that counsel will withdraw unless the terms are fulfilled.
>
> 5. Defendant Hughes is aware that his counsel is filing this motion.

Following the motion to withdraw Mr. Monroe and Mr. Lockhart, "[d]uring the last week of January, 1998, [J. Russell Ormesher] had discussions with T. Robert Hughes about representing him, ARCO Business and ARCO Properties. . . ." [Aplt's App. At 189].

Thereafter, on February 3, 1998, the court entered a minute order granting the motion of Messrs. Monroe and Lockhart to withdraw as attorneys for Hughes and the ARCO Trusts. [Aplt's App. At 1249]. Hughes and the ARCO Trusts acknowledged the trial court's order on February 12, 1998, by filing a Memorandum to the Court Regarding Representation Status:

> 1. Acknowledging receipt of the order permitting the withdrawal of previous counsel and informing the Court that "substitute Counsel is actively being sought.
>
> 2. Seeking "leave or permission" to proceed *pro se* to join in pleadings of co-defendants and to urge "ancillary or additional points of law which apply only to" Hughes and the ARCO Trusts.

[Aplt's App. At 015, 1249 Doc.39].

On February 18, 1998, Hughes appearing *pro se* on behalf of himself and as trustee of the ARCO Trusts, filed a Motion in Limine with Memorandum Brief seeking pretrial evidentiary rulings and a Motion to Sever or Continue. In the Motion to Sever Or Continue, Hughes advises the Court:

> . . . that despite diligent efforts to secure substitute counsel, the same has not been accomplished to date. *The prospective Counsel chosen by the undersigned* has been contacted and has taken the request for representation of the undersigned under advisement . . . [Emphasis supplied].

[Aplt's App. At 017, 1250 Doc.42]. . . .

A Pretrial Conference was conducted on February 19, 1998, and the court inquired directly of Hughes concerning his representation. [Aplt's App. At 1250, minute order dated 2/19/98]. Relevant excerpts of this conference follow:

> **MR. BRUNTON:** [Rhoades Counsel] . . . And *I would like for the Court to inquire of Mr. Hughes* as to where he stands and what the Court may or may not be willing to accept with regards to his representations, or representation come Monday if this Court decides to proceed on Monday. [Emphasis added].
>
> **THE COURT:** Mr. Hughes.
>
> **MR. HUGHES:** Yes, sir.
>
> **THE COURT:** I have just been handed your motion to sever or continue. Anything you wish to say concerning that motion?
>
> **MR. HUGHES:** Yes, Your Honor, this is Bob Hughes and I would ask the Court's consideration as opposed to Mr. Brunton's request postponing that until the last item that is dealt with today, because depending upon the Court's rulings on some of these other matters, *I might be willing to proceed to trial as early as Monday. Depending on the Court's rulings, I would then, you know, ask that this motion be reinstated if we could consider this motion in suspense until the end of the pretrial conference this morning, it would assist me in making my decision as to whether I should be down there and be prepared for trial*

> *Monday without counsel while I'm still attempting to secure counsel that would come in as soon as possible, or whether I need to ask the Court's indulgence in granting a continuance or preferably a severance now.* [Emphasis added].

[Aplt's App. At 574-75].

At the conclusion of the Pretrial Conference, the following exchanges occurred between Hughes and the Court:

> **MR. HUGHES:** . . . . Next, I guess would be motion to sever or continue.
>
> **THE COURT:** Well, as I understand it, you discharged your attorneys about a month ago, I think it was on the 21st of January, and have not gotten any other attorneys; is that right?
>
> **MR. HUGHES:** I do not, Your Honor. I am — *I have an attorney who has preliminarily agreed*, and I would be receiving his answer as early as today, tomorrow or the first of next week, but at this point I did not have additional representation, and I would point out to the Court that I did not discharge my other attorneys. [Emphasis added].
>
> **THE COURT:** Well, my understanding was that you did know about it and then you did concur in their withdrawal.
>
> **MR. HUGHES:** Well, I didn't — I didn't feel as a matter of good conscience since they wanted

to withdraw and *I was in disagreement with some — with an aspect or a course of action that they were suggesting*, that it was in my best interest to stay and have us not be getting along, so I didn't — *I certainly didn't object*. [Emphasis added].

One of witnesses who can reflect light on that particular subject would be the co-defendant Mr. Thomas Rhoades, and Mr. Brunton advised me two or three days ago, I apologize, I don't remember which, that it was his intent that Mr. Rhoades not give evidence of any nature in the form of an affidavit or anything at this point, and it may not be — may not be, but I don't know, going to testify at trial.

If I'm not in a position to have a witness that is relevant to a defense that is applicable only to me because of Mr. Brunton's desire to exercise his client's legal rights, then that will infringe upon my ability to present a defense, and I would ask the Court to strongly consider the Motion to Sever so that when the first issues are done, and Mr. Rhoades has either won or lost or however the Court disposes of the matter with regard to Mr. Rhoades and Mr. Schluneger, whether at trial or otherwise, Mr. Rhoades would then not be under the same constraint or advice from his attorney not to offer testimony, and it would impact upon — seriously impact upon my potential defense involving the statute of limitations.

THE COURT: Well, absent more specific information, I have got to deny your request. I

> will tell you though that during trial if a matter should arise, you may re-urge the severance.
>
> **MR. HUGHES:** All right, Your Honor.

[Aplt's App. At 603-05].

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit Court of Appeals has established a conclusive presumption of forfeiture of the Right to Counsel when an attorney defendant acts to defend himself at a time when he is without counsel, thus abrogating the mandate of *Faretta* that the trial court must insure that a waiver of counsel is voluntarily, knowingly and intelligently made.

In its opinion, the Tenth Circuit Court of Appeals correctly noted that the Sixth Amendment places upon the trial court the burden to insure that the waiver of counsel was voluntary, knowing and intelligent. Further, "ideally, the trial judge should conduct a thorough and comprehensive formal inquiry of the defendant on the record to demonstrate that the defendant is aware of the nature of the charges, the range of allowable punishments and possible defenses, and is fully informed of the risks of proceedings *pro se*." *United States v. Hughes*, 191 F.3d 1317, 1323 (10th Cir. 1999).

In its post-trial order, the trial court held that

> finally, Hughes argues that he was denied effective assistance of counsel by the court granting his request to permit his *pro se* representation. There is no evidence that Hughes

> request to proceed *pro se* was not voluntarily or knowingly made. Hughes was represented by retained counsel prior to and after he was indicted. Hughes stated on the record that he did not object to his counsel's request to withdraw prior to commencement of trial, the court granted Hughes an adequate opportunity to retain new counsel if he elected to do so. Hughes, instead, elected to represent himself. In that Hughes is a licensed attorney, the court granted his request. Accordingly, there is no basis for Hughes to now complain that the court denied him the right to effective assistance of counsel.

See Trial Court's post-trial order of August 26, 1998, page 12.

It can be seen from the record in this case that there is no support for the trial court's conclusion. Petitioner had at all times informed the Court that he wished counsel to assist him in his case. Petitioner did not cease to inform the court of this desire until the conclusion of the government's case when he again moved for a continuance in order to hire counsel. Secondly, in the very same instrument, the Court points to as conclusive, in which Petitioner asked to represent himself *pro se*, he first informed the court that he was attempting to hire other counsel at that very time. The rational conclusion to be drawn from this representation by Petitioner is that he wished to represent himself *pro se* only during a critical time in the proceedings i.e., pre-trial motions, when he was without counsel. Instead of being dilatory, Petitioner was diligent in that he wished to continue the pretrial matters, and if possible, keep the trial dates specified by the court.

Again, in his *pro se* Motion to Sever or Continue of February 18, 1998, Petitioner advised the District Court that

> despite diligent efforts to secure substitute counsel, the same has not been accomplished to date . . . the prospective counsel chosen by the undersigned has been contacted and has taken the request for representation under advisement, but has not yet had sufficient time to devote to the review of the case documentation and such other matters as said counsel deems appropriate to making his final determination as to whether or not to accept the representation of the undersigned.

In *Faretta v. California*, *supra*, this court noted that "the Sixth Amendment Right to the assistance of counsel implicitly enbodies a correlative right to dispense with a lawyer's help. *Id.* 2530. These rights are not legal formalisms as they rest on considerations that go to the substance of an accused position before the law. *Id.* 2531.

> The Sixth Amendment includes a compact statement of the rights necessary to a full defense: "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for any witnesses in his favor, and to have the assistance of counsel for his defense."

Id. 2532.

However, "to preserve the protection of the bill of rights for hard pressed defendants, we indulge every reasonable presumption against waiver of fundamental rights". *Glasser v. United States*, 315 U.S. 60. Further "on the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." This duty

> is not discharged as a mere matter of rote, but with sound and advised discretion with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof with a caution increasing in degree as the offenses dealt with increase in gravity.

This protecting duty imposes the more serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court and it would be fitting and appropriate that determination to appear upon the record. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

In the case sub judice, the trial court wholly failed to protect Petitioner's rights to counsel at trial although being advised by Petitioner on at least four occasions that he was seeking to secure counsel. Even if, as the government argues, his requests were ambiguous, they were sufficient to alert the trial judge to the necessity of having a hearing on the record to determine whether or not Petitioner was in fact requesting the right to represent himself and waive his right to counsel at trial. The trial court should have held a hearing prior to impaneling the jury after Appellant requested a continuance to seek counsel in order to determine whether

Petitioner's waiver was knowingly and voluntarily and intelligently made.

> In a trial by jury in a Federal Court, the judge is not a mere moderator, but the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. *Herron v. Southern Pacific Company*, 283 U.S. 91, 95, 51 Sup. Ct. 383, 384, 75 L. Ed. 857, 860 (1931). "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused."

Glasser v. United States, 315 U.S. 60, 62.

Petitioner was an attorney who had no experience in criminal trials. While the fact that a defendant may be an attorney is immaterial to a consideration of his right to assistance of counsel under the protection of the Sixth Amendment, his professional experience might be a factor for the court to use in determining whether he actually waived his right to the assistance of counsel, but it is by no means conclusive. *Glasser v. United States*, at p. 60. Glasser was in fact an experienced criminal trial lawyer and former prosecutor at the time he was tried. Just as Petitioner was accused by the Court in acquiescing to its discharge of his counsel because of certain "conflicts", Glasser was accused of passively acquiescing in the appointment of a lawyer who had conflicts because he failed to renew vigorously his objection at the instant the appointment was made. This Court held, however, that the fact ultimately turned on whether even an experienced trial lawyer such as Glasser, actually waived his right to the assistance of counsel under the test of *Johnson v. Zerbst*, *supra*.

The trial court below, in effect, waived Petitioner's right of counsel for him, leaving him without counsel at a critical stage in the proceeding against him, forcing him to act as his own attorney before the jury. Such action by the trial court resulted in Petitioner's well-intentioned but inept self-representation which resulted in his sole defense of withdrawal being reviewed for "plain error" on appeal because of procedural defaults at the trial.

II. The opinion of the Tenth Circuit Court of Appeals has lowered the constitutional threshold for determining waiver of the right to counsel at trial mandated by this court in *Faretta*.

In its absolution of the trial court, the Tenth Circuit Court of Appeals cautioned that

> we have previously warned that "the right to make a knowing and intelligent waiver of the right to counsel does not grant the defendant license to play a cat and mouse game with the court, or by ruse or stratagem fraudulently seek to have the trial judge placed in the position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel." *United States v. Allen*, 895 F.2d 1577, 1578 (Tenth Cir. 1990).

United States v. Hughes, 191 F.3d 1317, 1323 (10th Cir. 1999).

The Tenth Circuit held that Petitioner forfeited his right to counsel by engaging in tactics "designed to delay the proceedings".

In such a situation, opined the court,

> a waiver may be valid absent an inquiry by the court where "the surrounding facts and circumstances, including the defendant's background and conduct, demonstrate that the defendant actually understood his right to counsel and difficulties of *pro se* representation and knowingly and intelligently waived his right to counsel."

Id. at 1323. The Court held Petitioner accountable for the fact that he sought to continue the pretrial preparations without immediately seeking a continuance the moment the court discharged prior counsel. The fact that Petitioner did not seek a continuance until the eve of the trial was evidence to the appellate court of "dilatory conduct" demonstrating "that Hughes voluntarily chose to proceed without counsel", citing *United States v. Mitchell*, 777 F.2d 248, 258 (5th Cir. 1985) ("no matter how fundamental the right to counsel may be, it may not be used as a means of delaying or trifling with the court"). *Id.* 1323.

This holding by the Tenth Circuit Court of Appeals represents an enlargement of the narrow exception engrafted by several circuit courts on *Faretta*, *viz*; that a defendant who in bad faith manipulates the trial by the tactic of delaying or refusing to hire counsel, effectively waives that right. *See United States v. Goldberg*, 67 F.3d 1092 (3rd Cir. 1995). After relieving Ronald Goldberg's court-appointed attorney, the District Court refused his request for a continuance in order to retain private counsel. This forced Goldberg to stand trial without the assistance of counsel. The District Court concluded that by his manipulative conduct, Goldberg had

waived "or more properly" forfeited his Sixth Amendment Right to counsel.

> The question before us is whether the District Court deprived the Defendant of his Sixth Amendment right to counsel. We conclude that, although there are circumstances in which the dilatory tactics of a defendant can amount to the forfeiture of his right to counsel, the record here is insufficient to support such a forfeiture. We further hold that the District Court's failure to warn the defendant of the risk of self representation precludes us from finding a valid waiver by conduct.

Id. at 1094. The Third Circuit found that a lack of waiver existed even though Goldberg had threatened the life of his court appointed attorney. *Id.* at p. 1095.[1]

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1. The Third Circuit had little regard for the authority of *United States v. Mitchell*, 777 F.2d 248 (5th Cir. 1985), *cert. denied*, 476 U.S. 1184, 106 Sup. Ct. 2921, 91 L. Ed. 2d 549 (1986) upon which the Tenth Circuit relied.

> Typical of the confusion surrounding those concepts is *United States v. Mitchell . . . citations omitted. . . .* In *Mitchell* the Court of Appeals for the Fifth Circuit held that a defendant who knowingly retains an attorney with a scheduling conflict and fails to secure other counsel within a reasonable time, "waives his right to counsel." There is no abuse of discretion even though the denial of the continuance resulted in Mitchell being unrepresented throughout the trial. *Id.* at 257. The Mitchell Court did not discuss the implications of Faretta or Johnson. Its decision, therefore, rested on notions of forfeiture, not waiver.

The under pinnings of the Tenth Circuit opinion, appear to be based on concepts of forfeiture and not waiver.

As further evidence of a split of authority among the circuits, Petitioner would invite the court's attention to what has become known as the "hybrid situation ('waiver by conduct')". *Id.* at p. 1100. This situation combines elements of waiver and forfeiture in holding that once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the defendant's right to counsel.[2]

Petitioner requests this Court to decide whether or not, in absence of a valid waiver on the record, he has forfeited his right to counsel of choice at trial.

> Although the Supreme Court has not ruled directly on this issue, instructive is *Illinois v. Allen*, 397 U.S. 337 (1970). In Allen, the Court considered whether the trial court could remove an unruly defendant from the courtroom without violating

2. *United States v. Bower*, 956 F.2d 693 (7th Cir. 1992) (Failure to hire counsel where defendant has financial ability to do so constitutes a waiver by conduct), *cert. denied*, 506 U.S. 882, 113 Sup. Ct. 234, 121 L. Ed. 2d 169 (1992); *United States v. Allen*, 895 F.2d 1577 (10th Cir. 1990) (District Court properly treated defendant's dilatory conduct as a request to proceed *pro se*.) Both Bower and Allen, however recognized that the extent to which the Defendant's actions are examined under the doctrine of "waiver", there can be no valid waiver of the Sixth Amendment right to counsel unless the defendant also receives *Faretta* warnings. *Bower*, 956 F.2d at 695; *Allen*, 895 F.2d at 1579; *See also United States v. Meeks*, 987 F.2d 575 (9th Cir.), *cert denied*, 510 U.S. 919, 114 Sup. Ct. 314, 126 L. Ed. 2d 261 (1993); *See United States v. Goldberg* at 1100.

> his Sixth Amendment Right to be present at his trial. The Court held that a defendant can lose his Sixth Amendment Right to be present at trial after he has been warned by the Judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the Court, that the trial cannot be carried on with him in the courtroom. *Id.* at 343. (*Emphasis added*) (*Footnote omitted*). Whether or not the warning was required of a matter of constitutional law or under the particular facts is somewhat unclear. Suffice it to say that the Court has approved the trial court's decision to deprive a defendant of a fundamental constitutional right at least where the defendant is aware of the consequences of his action, but regardless of whether defendant affirmatively wishes to part with that right.

United States v. Goldberg, at 1101.

The Tenth Circuit Court of Appeals held that Petitioner waived his right to be represented by counsel at trial by conduct where the trial court wholly failed to warn him on the record that his conduct could constitute a waiver of fundamental rights guaranteed by the Sixth Amendment. In *Faretta v. California*, *supra*, this Court recognized that whether or not Faretta was successful or artful in representing himself was not the question, so long as his waiver was knowingly voluntarily and intelligently made. Here, Petitioner, in effect, suffered a forfeiture of his right to counsel, and he proceeded to represent himself at trial as best he could however ineptly. Petitioner was harmed by the

Tenth Circuit Court of Appeals' assumption that he waived counsel simply because as a lawyer, he acted in his own behalf when he was without counsel. Such a construction undermines the vitality of Faretta and abrogates the holding of this Court in *Glasser.*

III. This Court should resolve a split of authority in the Circuit Courts of Appeal on the issue of whether or not the production of prima facie evidence of withdrawal from a conspiracy by the accused shifts the burden of proof to the government to rebut or impeach that issue.

Petitioner's sole defense at trial was withdrawal from the conspiracy.

Petitioner asserts that there is a conflict among the circuits as to whether or not the Tenth Circuit jury instructions on withdrawal from a conspiracy properly allocate the burden of proof between defendant and the government. At trial, the trial court properly charged the jury on the issue of withdrawal under the law of that circuit. The trial court also propounded special issues to the jury as to whether or not Petitioner had adduced sufficient evidence before the jury for it to conclude that ARCO business, ARCO properties, and Robert Hughes individually had withdrawn from the conspiracy. What the Court failed to do, however, was instruct the jury that upon Petitioner making a prima facie showing of withdrawal, the burden shifted to the government to impeach or rebut that showing.

The Tenth Circuit held that:

> In this circuit, the law is clear that defendant bears the burden of establishing withdrawal from a

> conspiracy. See *United States v. Fox*, 902 F.2d 1508, 1506 (10th Cir. 1990); *Parnell*, 581 F.2d at 1384. Hughes argues that this Court should ignore Tenth Circuit law and hold that once a defendant produces sufficient evidence of a prima facie case of withdrawal, the burden shifts to the government to rebut that showing. *See e.g., United States v. Steele*, 685 F.2d 793, 804 (3rd Cir. 1982). We cannot overrule the judgment of the prior panel of this Court. See *In re: Smith*, 10 F.3rd, 723, 724 (10th Cir. 1993) (*per curiam*). Even if we were able or inclined to do so, Hughes and ARCO properties have failed to produce any evidence of their withdrawal from the conspiracy. The jury instruction in this case was in accord with the law of this circuit and thus, there was no plain error.[3]

On appeal, Petitioner urged the Tenth Circuit to adopt the reasoning of the United States Court of Appeals, Third

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3. The circuit court's statement that no evidence of withdrawal was produced by Hughes or ARCO Properties is not supported by the trial record. In addition to the letter dated June 27, 1992 introduced as Defendants' Exhibit 1 on behalf of Hughes and both ARCO trusts, Petitioner Hughes gave (unrebutted) direct testimony as to the facts and circumstances which constituted the act of withdrawal by Hughes (personally) and both ARCO trusts, and Hughes (in his capacity as counsel for Petitioner at trial) elicited corroborating (unrebutted) testimony from the government's witnesses to the effect that neither Hughes nor either of the ARCO trusts received any payment or benefit, or participated in the conspiracy in any manner after the date of withdrawal. The jury ultimately held that only ARCO Business Services, Ltd. had withdrawn.

Circuit, in its holding in *United States v. Steele*, (685 F.2d 793) (3rd Cir. 1982), where the Court held that:

> When a defendant has produced sufficient evidence to make a prima facie case of withdrawal, however, the government cannot rest on its proof that he participated at one time in illegal schemes; it must rebut the prima facie showing either by impeaching the defendant's proof by going forth with evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal.

Id. 804. This Court has declared that a burden — shifting charge intrudes on an accused's due process right not to be convicted except on proof by the government beyond reasonable doubt of every element of the crime charged. *Sandstrom v. Montana*, 442 U.S. 501 (1979). Petitioner is well aware that in Sandstrom, the Court indicated that the language "the law presumes," might denote a conclusive or burden — shifting presumption, and a jury hearing such language might believe that they were directed to find against the defendant or that the defendant must negate criminal intent. *Id.* at 2455-60. Petitioner's situation presents the opposite side of that coin, to wit: the deprivation of a proper presumption shifting the burden of proof to the government upon Petitioner's prima facie showing of withdrawal. Petitioner's claims are consistent with the holding of this Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), that the prosecution must prove beyond a reasonable doubt that a killing was not done in "the heat of passion". This was so because, even though the Court may not place such burden on the defendant, it may require him to go forward with some evidence of his own. In holding *Mullaney v. Wilbur*, *supra*,

to be retroactive in its application, this Court held that the Wilbur doctrine "affects the integrity of the fact-finding process". *Hankerson v. North Carolina*, 432 U.S. 233 (1977).

Petitioner submits that the real issue in this case is that under the holding of the Tenth Circuit Court of Appeals he was required to carry the burden of proof upon a fact which the prosecution would have been required to rebut or impeach under the law of other circuits. The Second Circuit is in accord with the Third Circuit on this due process issue requiring some impeachment or rebuttal by the government[4] Petitioner submits that this is in line with the court's reasoning in *Jackson v. Indiana*, 92 S. Ct. 1845, 1851 (1972) in finding a violation of equal protection rights where "if criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice." *Id.* 1851.

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4. *See United States v. Lowell*, 649 F.2d at 950 & n.16 (1981); *United States v. Goldberg*, 401 F.2d 644, 648-49 (2d Cir. 1968), *cert. denied*, 393 U.S. 1099, 89 S. Ct. 895, 21 L. Ed. 2d 790 & 394 U.S. 932, 89 S. Ct. 1202, 22 L. Ed. 2d 461 (1969).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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